SUPREME COURT, U. S.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

74-170

CASE NO: A-1323

ROBERT JAMES ANDRINO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ROBERT JAMES ANDRINO, respectfully prays for the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals, for the Ninth Circuit, entered on May 8, 1974, rehearing denied June 20, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals, for the Ninth Circuit, entered May 8, 1974, not yet reported, appears in the appendix hereto as Appendix A. Denial of Rehearing which was entered on June 20, 1974, and, appears as Appendix B. Adjudication of Guilty and Sentence entered by the United States District Court, Phoenix, appears as Appendix C. A copy of the charge appears as Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit, was entered May 8, 1974. A timely petition for rehearing was denied on June 20, 1974. Order extending time to file petition for writ of certiorari was granted on July 25, 1974. A copy is annexed hereto as Appendix E.

This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

WHEN FELONY CONVICTIONS ARE SET ASIDE, PURSUANT TO THE LAWS OF CALIFORNIA AND NEVADA, CAN ONE BE CONVICTED UNDER THE FEDERAL CODE FOR ACQUISITION OF A FIREARM BY FALSELY STATING THAT HE WAS NOT A CONVICTED FELON?

II

IS A DEFENDANT DEPRIVED OF HIS RIGHT TO APPEAL WHEN AN APPELLATE COURT FAILS TO CONSIDER MANY COUNTS OF AN INDICTMENT FOR THE REASON THAT IT AFFIRMED OTHER COUNTS?

III

IS ENFORCEMENT OF FEDERAL LAW, AGAINST ARBITRARILY SELECTED GROUPS, CONSTITUTING A "WATCH LIST", DENIAL OF CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment of the United States Constitution

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . . ."

14th Amendment of the United States Constitution

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

18 U.S.C. Section 922(a)(6)

"(a) It shall be unlawful —

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other deposition of such firearm or ammunition, under the provisions of this chapter."

18 U.S.C. § 924(a)

"Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or

exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000.00, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine."

18 U.S.C. APP. § 1202(a)(1)

"(a) Any person who —

(1) has been convicted by a court of the United States or of a state or any political subdivision thereof of a felony, or . . . and

(a) who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both."

California Penal Code, § 1203.4

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time thereafter be permitted by the court to withdraw his plea of guilty or nolo contendre and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusations or information against such defendant, who shall thereafter be

released from all penalties and disabilities resulting from the offense or crime of which has been convicted. The probationer shall be informed of this right and privilege in his probation papers. The probationer may make such application and change in plea in person or by attorney, or by the probation officer authorized in writing; provided, that in any subsequent prosecution of such defendant or any other offense, such prior conviction may be pleaded and proved and have the same effect as if probation had not been granted or the accusation or information dismissed. Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."

Nevada Revised Statutes, § 176.225

"Honorable discharge from probation.

1. Every defendant who:

(a) Has fulfilled the conditions of his probation for the entire period thereof, or

(b) Is recommended for earlier discharge by the chief parole and probation officer, or

(c) Has demonstrated his fitness for the honorable discharge but because of economic hardship, verified by a parole and probation officer, has been unable to make restitution as ordered by the court, may at any time thereafter

be permitted by the court to withdraw his plea of guilty or nolo contendre and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court may set aside the verdict of guilty and in either case, the court shall thereupon dismiss the indictment or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.

2. The probationer shall be informed of this privilege in his probation papers.

3. The probationer may make such application and change of plea in person or by attorney, authorized in writing, or by a parole and probation officer authorized in writing; but in any subsequent prosecution of the defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation has not been granted or the indictment of information had not been dismissed.

4. The clerk of the court shall notify every person who, and every agency who, to his knowledge has obtained from the court or clerk knowledge of the conviction that the probationer has been honorably discharged and is released as provided in Subsection 1.

5. Any amount of restitution remaining unpaid constitutes a civil liability arising upon the date of discharge.

STATEMENT OF THE CASE

Petitioner, ROBERT JAMES ANDRINO, was indicted in Phoenix, Arizona, on twelve counts of firearms violations. Counts one through six of the indictment charged the Petitioner with making false and fictitious statements in connection with the acquisition of a firearm, in violation of 18 U.S.C. Section 922(a)(6) and 924(a). Count seven charged the Petitioner with receipt, by a convicted felon, of a firearm, transported interstate, in violation of 18 U.S.C. App. Section 1202(a)(1). In Counts eight through twelve, Petitioner was charged with possession by a felon of firearms, transported interstate in violation of 18 U.S.C. App. Section 1202(a)(1) (R. 1-6).

Petitioner waived right to trial by jury and was found guilty by the Court of all twelve counts charged in the indictment (Tr. 91). Judgment and commitment were entered on May 15, 1972 (Tr. 93). Petitioner was remanded to the custody of the Attorney General for a term of imprisonment of two years on each count, one through twelve, to be served concurrently. It was additionally ordered by the Court that all of such sentences were to be served consecutively to a sentence imposed prior to this conviction. Appeal was timely filed. The Appellate Court affirmed the decision below as to counts one through six, deeming it thereby unnecessary to rule on the remaining counts.

Petition for rehearing was denied on June 20, 1974. On July 25, 1974, an order was entered extending the time to file petition for writ of certiorari to August 19, 1974.

STATEMENT OF FACTS

The Petitioner, ROBERT JAMES ANDRINO, was found guilty on a felony charge of conspiring to commit acts of prostitution in Hollister, California on October 6, 1959 (Tr. 43-44). Subsequently, he was convicted of the felony of swindling in Alko, Nevada on January 4, 1963 (Tr. 43-44).

Thereafter, under the provisions of Section 1203.4 of the California Penal Code and Section 176.225 of the Nevada Revised Statutes, the charges were dismissed and the verdicts of guilty were set aside and the Petitioner was released from all penalties and disabilities resulting from the offenses (Tr. 21, 23, 28).

On June 18, 1970 (R. 1), August 19, 1970 (R. 2) and August 26, 1970 (R. 3) Andrino purchased various firearms, from licensed gun dealers. He, at the time of the purchase, affixed his signature to firearms transaction records (Tr. 19) stating that he had not been convicted of any crime punishable by a term of imprisonment exceeding one year, and stating, at the time of the purchase, he was not a convicted felon (Tr. 28).

The trial record reflected the fact that Petitioner's name was on a special watch list of particular individuals selected by agents of the Alcohol, Tobacco and Firearm Division, assigned to what is known as "organized crime."

REASONS FOR GRANTING THE WRIT

POINT ONE

I

WHEN FELONY CONVICTIONS ARE SET ASIDE, PURSUANT TO THE LAWS OF CALIFORNIA AND NEVADA, CAN ONE BE CONVICTED UNDER THE FEDERAL CODE FOR ACQUISITION OF A FIREARM BY FALSELY STATING THAT HE WAS NOT A CONVICTED FELON?

Counts one through six of the indictment charged the Petitioner with making false and fictitious statements to a licensed gun dealer, in connection with the acquisition of a firearm (R. 1-6). Proof of this offense depends upon a showing that the Petitioner was, at the time of acquisition, a convicted felon. However, although Andrino entered a plea of guilty to a charge of conspiracy to commit acts of prostitution in Hollister, California, on October 6, 1969, and pled guilty to a swindling charge at Alco, Nevada on January 4, 1973, under the laws of each state, his guilty plea was thereafter withdrawn and a plea of not guilty was filed in relation to each conviction (Tr. 21, 23).

Petitioner was then released from all penalties and disabilities resulting from the crime of which he had originally been convicted in each state. At the time the charges were dismissed against him in California, the Defendant was informed that his rights had been restored, and that he would "never have to be called an ex-convict or ex-felon" again (Tr. 33). At no time during

Andrino's affixation of his signature to various firearms transaction records, referred to in counts one through six of the indictment, did he believe himself to be a convicted felon (Tr. 26-29).

The original status of Petitioner, as a convicted felon, resulted from violation of California and Nevada law. It was not created through violation of federal law.

The change of status from convicted felon to one against whom charges had been dismissed, i.e., not a convicted felon, also resulted from operation of California and Nevada law and California and Nevada courts.

In 1968 federal gun control legislation was enacted. The link between that legislation and the conviction sought to be reviewed was the status of Petitioner, at the time he purchased the firearms, presenting himself to be a person who was not a convicted felon.

It would appear, legally, that at a minimum, it must be conceded that a reasonable doubt existed as to Andrino's status.

In **People v. Taylor**, 178 Cal. App. 2d 472, 3 C.R. 186 (1960), Taylor was charged with being a felon in possession of a firearm, and thus, in violation of Penal Code, Section 12021. The evidence presented at trial showed that the defendant had been granted relief under Penal Code, Section 1203.4. The sole question on appeal was: "Whether a prior felony conviction which, pursuant to Penal Code, Section 1203.4, has been set aside, the information dismissed and the defendant released from all penalties and disabilities, is nevertheless a prior felony within the meaning and purview of Penal Code, Section 12021."

The court held that the defendant could not be charged with violation of Penal Code, Section 12021, since relief had been afforded to her under Penal Code, Section 1203.4. In reaching their conclusion, the court relied upon the analysis of **Kelly v. Municipal Court**, 160 Cal. App. 2d 38, 324 P. 2d 990 (1958).

The Nevada courts have not yet spoken on the subject.

Just as the federal courts would have no jurisdiction to convict for a violation of state law, so it is urged that the federal courts should recognize the full effect and result of the states' criminal laws, including the pardon system enacted by a state legislature.

The state criminal codes are not uniform. Congress may not make them so. Activities illegal in one state, may not be in another.

POINT TWO

II

IS A DEFENDANT DEPRIVED OF HIS RIGHT TO APPEAL WHEN AN APPELLATE COURT FAILS TO CONSIDER MANY COUNTS OF AN INDICTMENT FOR THE REASON THAT IT AFFIRMED OTHER COUNTS?

The United States Court of Appeals, Ninth Circuit, under the Concurrent Sentence Doctrine, declined to rule on counts seven through twelve, inclusive, under the authority of **United States v. Gaines**, 460 F.2d 176 (2nd Cir. 1972).

In Gaines, however, it is pointed out that since **Benton v. Maryland**, 359 U.S. 784, 89 S.Ct. 4056, 23 L.Ed.2d 707 (1969), the United States Court of Appeals, Second Circuit, has, in the main, reviewed all the counts of a multi-count conviction, when concurrent sentences have been imposed, even though the conviction, on at least one count, was clearly sustainable.

In **Benton**, supra, this court recognized the fact that most criminal convictions do, in fact, entail adverse collateral legal consequences. See **Sibron v. New York**, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968).

Although the Concurrent Sentence Doctrine does provide for judicial convenience, the failure to reverse, if reversal is appropriate, of six convictions, under six counts of an indictment, can have immediate collateral results. It is possible, for example, that had those counts been reversed, an immediate effect might have been realized in submission of the case for mitigation of sentence, under Rule 35 of the Federal Rules of Criminal Procedure.

The conviction, on violation of two sections of the federal law, as opposed to one, may have further serious collateral consequences in that under 18 U.S.C., Section 924(a), immediate parole is possible under the terms of the act, while under 18 U.S.C. App. 1202(a)(1) the same eligibility for parole does not appear in the act.

It is respectfully submitted, therefore, that although the sentences were nominially concurrent, the availability of relief from imprisonment is not identical.

In this case, each of the counts, which the Circuit Court declined to rule upon, involved a single question of law.

Benton, supra, when read with the concurring opinion, would lead to the belief that this court intended the use of the Concurrent Sentence Doctrine to be the exception and not the rule. The failure to determine the entire case, here, leads to an interesting and unusual situation. The United States Court of Appeals, Ninth Circuit, failed to distinguish between the interstate commerce requirement of 18 U.S.C., Section 922(a)(6) and 18 U.S.C. App. 1202(a)(1).

The court below discussed the fact that it did not have to consider interstate commerce since no reference to intrstate commerce is requird in 18 U.S.C. 922(a)(6). The effect of failing to consider counts seven through twelve was to void consideration of the threshhold jurisdictional question of interstate commerce altogether, since such connection with commerce is required under 18 U.S.C. App. 1202(a)(1).

Under such circumstances, it is suggested that the convenience reflected by the Concurrent Sentence Doctrine is more than off-set by the avoidance of necessary jurisdictional problems inherent in the factual questions presented to the court.

POINT THREE

III

IS ENFORCEMENT OF FEDERAL LAW, AGAINST ARBITRARILY SELECTED GROUPS, CONSTITUTING A "WATCH LIST", DENIAL OF CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION UNDER THE LAW AND THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

The United States Court of Appeals, Tenth Circuit, considered the Petitioner's contention that the government's maintenance of his name on a "watch list" of possible suspects, was an arbitrary act of discrimination, unsupported under the Fourteenth Amendment.

In rejecting the argument, the court relied upon authority not applicable to the situation. **United States v. Thoresen,** 428 F.2d 654 (9th Cir. 1970), **United States v. Synnes,** 438 F.2d 764, 771-772 (8th Cir. 1971) vacated on other grounds 404 U.S. 1009 (1972) and **United States v. Karnes,** 437 F.2d 284, 289 (9th Cir. 1971) cert. den. 402 U.S. 1008 (1971).

The cases cited concerned themselves with the prior conviction aspect of the law. Petitioner is concerned with conviction, without accusation, trial or confrontation by witnesses, when he is labeled (without foundation or fact) as a member of "organized crime."

The use of "strike force" attorneys working on "organized crime;" the use of United States agents, working on the same matters, has created a serious constitutional problem in trials in the federal courts. The same problem follows to incarceration, where the label persists.

Frequently, a Defendant is not aware of the label.

There is, however, no federal Judge who is not aware of the implications of a case being presented by a "strike force" attorney rather than as Assistant United States Attorney. That was the point raised in the United States Court of Appeals, Ninth Circuit. The opinion sought to be reviewed does not address itself to that point.

The attack upon this method of conviction of being a member of a particular group, without accusation, trial or hearing, is supported by **Wisconsin v. Constantineau,** 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971). That court held that a state statute which provided for the "posting," without notice or hearing, of any person who was an excessive consumer of alcoholic beverages constituted an unconstitutional violation of procedural due process. It is precisely that type of activity engaged in by the government in arbitrarily and clandestinely placing the appellant's name upon a "select list" of known felons that the **Constantineau** Court sought to curtail by prohibiting the invasion of one's property or interests without providing for notice and a full and fair opportunity to be heard.

Similarly, in **Yick Wo v. Hopkins,** 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), the United States Supreme Court struck down various ordinances which were being enforced in a manner which operated to discriminate against persons of Chinese descent.

CONCLUSION

Petitioner respectfully suggests the propriety of the issuance of the Writ so that the entire record may be reviewed.

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/s/ Milton E. Grusmark

MILTON E. GRUSMARK

CERTIFICATE

I, MILTON E. GRUSMARK, attorney for Robert James Andrino, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of August, 1974, I mailed copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, for the Ninth Circuit, as follows:

On the United States by mailing a copy of same to the Solicitor General, Department of Justice, Washington, D.C. 20530.

/s/ Milton E. Grusmark

MILTON E. GRUSMARK

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-2141

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROBERT JAMES ANDRINO,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

(Filed May 8, 1974)

Before: BARNES, and HUFSTEDLER, Circuit Judges, and LUCAS,* District Judge.

LUCAS, District Judge:

This appeal is from Andrino's criminal convictions on twelve counts of violating Titles IV and VII of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§922(a)(6) and 924(a), and 18 U.S.C. App. §1202(a)(1), respectively. Counts one through six alleged the making of false and fictitious statements in connection with the

*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

acquisition of a firearm in violation of sections 922(a)(6) and 924(a); count seven alleged the receipt by a convicted felon of firearms transported interstate in violation of section 1202(a)(1); and counts eight through twelve alleged the possession by a convicted felon of firearms transported interstate in violation of section 1202(a)(1).

Andrino was found guilty on all counts at trial by court, waiving special findings of fact. He was sentenced to serve two-year terms on each count, to be served concurrently, but to be served consecutively with the sentences imposed in two prior cases which have also been appealed.

The issues presented for review are as follows:

(1) Whether or not there is a jurisdictional basis for deciding this case. Differently stated, is the congressional grant of jurisdiction to the Federal courts, as required for successful prosecution under §922(a)(6), a constitutional grant of jurisdiction;

(2) Whether the application of the California and Nevada expungement statutes to the respective State felony convictions operates as a bar to the application of the Federal criminal statutes in question by which Andrino was deemed to be convicted felon and under which he was convicted by the district court;

(3) Whether the Government's prosecution of Andrino whereby his name appeared as convicted felon on a list of selected suspects maintained for law enforcement purposes, constituted ar-

bitrary discrimination contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and,

(4) Whether the absence in the district court record of any showing of representation by counsel in the Nevada State trial, which convicted him on the charge of swindling, renders that conviction constitutionally suspect thereby precluding its usage as an element of the Federal offenses for which Andrino was convicted.

As previously indicated, counts I thru VI charge a violation of 18 U.S.C. §922(a). 18 U.S.C. §922(a) states:

"It shall be unlawful —

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive such importer, manufacturer, dealer, or colletcor with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter. . . ." (Chapter 44—Firearms).

Inherent in the basic jurisdictional issue is whether an interstate commerce nexus is required. 18 U.S.C. §922(a)(6) contains no reference to interstate commerce.

The Supreme Court has now held that Congress intended to reach wholly intrastate transactions under 18 U.S.C. 922(a) and that Congress had the power to do so on the theory that such transactions affect interstate commerce:

> "Finally, no interstate commerce nexus need be demonstrated. Congress intended, and properly so, that §§922(a)(6) and (d)(1) in contrast to 18 U.S.C. App. §1202(a)(1), see United States v. Bass, supra, were to reach transactions that are wholly intrastate, as the Court of Appeals correctly reasoned: 'on the theory that such transactions affect interstate commerce.' 472 F.2d, at 593. See also United States v. Menna, 451 F.2d 982, 984 (CA9). cert. denied. 405 U.S. 963 (1972), and United States v. O'Neill, 467 F.2d 1372, 1373-1374 (CA2 1972). Huddleston v. United States (No. 72-1076, March 26, 1974) 42 U.S.L.W. 4467, 4473."

We must, therefore, consider the only other substantial question raised on this appeal—Is the defendant a convicted felon, as that term is used in 18 U.S.C. §922(a)(6), §924(a), or 18 U.S.C. App. §1202(a)(1)?

Andrino's prior State convictions were for conspiring to commit acts of prostitution in California, and for swindling in Nevada, on October 6, 1959, and on January 4, 1963, respectively. Subsequently, on three separate occasions (June 18, 1970, August 19, 1970, and August 26, 1970) Andrino purchased several firearms from various licensed gun dealers in Arizona. At the time of those purchases, he signed Firearms Transaction Records certi-

fying that he had not been convicted of any crime punishable by a term of imprisonment exceeding one year.

Andrino argues that, as a result of the application of the California and Nevada expungement statutes, Cal. Penal Code, §1203.4,[2] and Nev. Rev. Stat., §176.225 (1967),[3] and that, as a result of his belief that he would "never have to be called an exconvict or an exfelon" again; he could not have made the requisite false and fictitious statements on the firearms' registration forms for which he was convicted under sections 922(a)(6) and 924(a). He cited People v. Taylor, 178 Cal. App. 2d 472, 3 Cal. Rptr. 186 (1960) for the proposition that a defendant could not be successfully charged with a violation of Cal. Penal Code, §12021,[4] prohibiting convicted felons from possessing firearms, in view of the relief available under the California expungement statute. However, the California legislature amended section 1203.4 in 1961 to provide, in a second paragraph, that dismissal of an accusation under this section does not permit a person to "own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021." Andrino's expungement occurred after this legislative amendment. Thus, the California legislature, by specific enactment, has negated the very theory under California law by which Andrino seeks to demonstrate the absence of a requisite element for the Federal conviction in question. Conceding this implication, Andrino nevertheless asserts that the California legislature did not specifically exclude from relief under section 1203.4 the particular offense in question—giving false or fictitious statements to a licensed firearms dealer in connection with the acquisition of small arms. This reasoning is erroneous inasmuch as the expungement statute retains a provision

that persons may not own, possess or control small arms, and states that its application does not negate the applicability of the concealable firearms statute, section 12021. Cf. United States v. Hoctor, Crim. No. 71-2773 (9th Cir., filed March 1, 1973. Since this analysis suffices to answer Andrino's contention on this particular point, a similar analysis of the Nevada expungement statute is unnecessary, and perhaps inappropriate in any event inasmuch as the Nevada courts have not passed upon the question.[6]

Finally, with respect to the contention that Andrino alleged a "good faith" belief in the effectiveness of the purge of the State convictions, the facts are strongly weighted against him. The record suggests ambiguity as best as to Andrino's recollection of the California expungement hearing. Furthermore, Andrino had executed a Felon Registration Form for the Phoenix police subsequent to the three occasions which led to the indictment in this case. Issues as to the credibility of Andrino's testimony concerning the California expungement hearing, and evidentiary conflicts as to what transpired during the signing of the registration form in Phoenix were resolved by the district court. It is not for the appellate court to reconsider them, or to substitute its inferences pertaining to witnesses' demeanor or to their testimony. United States v. Nelson, 419 F.2d 1237-1241 (9th Cir., 1969); but cf. United States v .Squires, 440 F. 2d 859, 865 (2nd Cir., 1971).

Andrino's third contention on appeal is that the Government's maintenance of his name on a "watch list" of possible suspects was an arbitrary act of discrimination unsupportable under the Fourteenth Amendment. Andrino's basic discriminatory classification argument was raised in an analogous context in United States v. Thoresen, 428

F.2d 654 (9th Cir., 1970) where appellants contested their convictions under section 2(e) of the Federal Firearms Act, ch. 850, §2(e), 52 Stat. 1250, 1251 (1938), since repealed by the Omnibus Crime Control and Safe Streets Act of 1968. Laws regulating the purchase of firearms by persons previously convicted of felonious crimes are well within those cases establishing a rational basis for State limitation of personal rights, and such classification is particularly consistent with sound principles where, as under the Federal Firearms Act [see 26 C.F.R. §177.31(c) (1966)] the 1968 Act provides means by which a classified person may apply for relief from the disabilities imposed thereunder [see 18 U.S.C. 925(c)]. See United States v. Thoresen, supra at 658-660; United States v. Synnes, 438 F.2d 764, 771-772 (8th Cir., 1971); vacated on other grounds. 404 U.S. 1009 (1972); see also United States v. Karnes, 437 F.2d 284, 289 (9th Cir., 1971); cert. denied, 402 U.S. 1008 (1971).

Andrino's final contention on appeal is that the absence of any statement in the district court record of any representation by counsel in the Nevada State trial resulting in the conviction for swindling renders that conviction invalid for purposes of application under section 1202(a)(1) Andrino's position is untenable. Not only did he fail to raise an objection in the district court as to the admissibility of the Government's record of the Nevada conviction, but Andrino introduced a certified record of the Nevada expungement proceedings, which was predicated upon the validity of the Government's exhibit, tending to authenticate the original swindling conviction. The stipulation as to the authenticity and the sufficiency of the Government's document alone is fatal to consideration of this issue for the first time on appeal. Estrella v. United

States, 429 F.2d 397, 399 (9th Cir., 1970); cert. denied 400 U.S. 1011 (1971); Benson v. United States, 402 F.2d 576, 580-581 (9th Cir., 1968). The embracement of this document as part of the defense's case below makes an attack upon its authenticity and sufficiency on appeal a meritless point. In any event, aside from the theoretical possibility of error in defense counsel's trial tactics in waiving objection, any error is deemed to have been harmless in the face of the evidence presented, and particularly in light of the California conviction's separate applicability under section 1202(a)(1). Harrington v. California, 395 U.S. 250 (1969). Further, thru our utilization of the concurrent-sentence doctrine resolution of this issue is mooted.

Because the defendant was convicted on each of twelve counts, and received the same sentence on each, which were to be served concurrently we need not, for the convenience of the Court decide the validity of the convictions in counts seven to twelve, inclusive. See United States v. Gaines 460 F.2d 176 (2d Cir., 1972). The judgment of conviction as to counts one thru six is affirmed.

FOOTNOTES

[1]The Ninth Circuit here follows the holdings of Nelson and O'Neill where §922(a)(6) is involved stating:

> "The Government did not prove that the firearm in question was shipped or transported in interstate commerce. But this was not required. . . . Congress intended to reach wholly intrastate transactions under the Firearms Act on the theory that such transactions affect interstate commerce. See Section 901 of Public Law 90-351, U.S. Code Cong. and Adm. News, 90th Cong., 2d Sess., p. 270 (1968)." Id. at 984.

[2]Section 1203.4 reads in part:

> "(a) Every defendant who has fulfilled the conditions of his probation for the entire period thereof or has been discharged from probation prior to the termination of the period

thereof shall, at any time thereafter, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted. . . ."

"Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."

[3]Section 176.225 reads in part:

"1. Every defendant who:

(a) Has fulfilled the conditions of his probation for the entire period thereof; or

(b) Is recommended for earlier discharge by the chief parole and probation officer; or

(c) Has demonstrated his fitness for honorable discharge but because of economic hardship, verified by a parole and probation officer, has been unable to make restitution as ordered by the court, may at any time thereafter be permitted by the court to withdraw his plea of guilty or nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty the court may set aside the verdict of guilty; and in either case, the court shall thereupon dismiss the indictment or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."

[4]Section12021 reads in part:

"Any person . . . who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country . . . who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense, and shall be punishable by imprisonment in the state prison not exceeding 15 years, or in a county jail not exceeding one year or by a fine not exceeding five hundred dollars ($500), or by both."

[5]Hoctor can be distinguished in important particulars. The Washington expungement statute, Wash. Rev. Code §9.95.240 (1957), was given much broader application than section 1203.4 Hoctor noted that the Washington Supreme Court had construed section 9.95.240 to restore a felon's "'preconviction status as a full-fledged citizen,'" Matsen v. Kaiser, 74 Wash. 2d 231, 237, 443 P. 2d 843, 846-847 (1968) (concurring opinion), and that the Attorney General of Washington had stated that the provisions of Wash. Rev. Code §9.41.040 (1935), prohibiting certain convicted felons from owning or carrying pistols, do not apply to one who has gained the benefits of section 9.95.240. In direct contrast, the California legislature amended section 1203.4 to expressly provide that the dismissal of an accusation does not permit a person to own, possess or control firearms concealable on the person, or prevent a conviction under section 12021. See discussion, supra. Thus, the two States are at direct variance in treating this particular problem under their laws. Since the determination of Andrino's status under California law is quite clear in that he should be deemed not exempt from liability under the expungement statute, the remaining question posed and resolved in Hoctor as to a Federal and Washington State conflict is avoided. In that case, the Government sought to demonstrate that the application of the Washington expungement statute did not affect the reach of 18 U.S.C. 842(i). (This section falls within Chapter 40—Importation, Manufacture, Distribution and Storage of Explosive Materials, 18 U.S.C. 841-848, which provides an enforcement scheme analogous to that in Chapter 44—Firearms, 18 U.S.C. 921-928, under which Andrino was convicted.) Hoctor found that 18 U.S.C. 848 demonstrated Congress' intent not to preempt this particular field to the exclusion of the States unless a "direct and positive conflict" existed between the Federal and State enforcement schemes. 18 U.S.C. 848; see also 18 U.S.C. 928. It further found that what differences did exist between Chapter 40 and the Washington statute were not irreconcilable. Therefore, in light of congressional intent not to override prior State law extant in the field, expressly provided in section 848, this Court in Hoctor deemed the application of section 9.95.240, as construed by Washington authorities, to be dispositive of the facts in that case.

[6]But cf. Tshimbidy-Rochu v. Immigration & Naturalization Service, 414 F. 2d 797, 798 (9th Cir., 1969).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docketed No. 72-2141

UNITED STATES OF AMERICA,
Appellee,

v.

ROBERT JAMES ANDRINO,
Appellant.

ORDER

[FILED, JUNE 20, 1974]
Clerk, U.S. Court of Appeals

Before: BARNES and HUFSTEDLER, Circuit Judges, and LUCAS, District Judge.*

The panel as constituted in the above case has voted to deny the Petition for Rehearing.

The Petition for Rehearing is unanmously denied.

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*Honorable Malcolm M. Lucas, United States District Judge, Central District of California, sitting by designation.

APPENDIX C

[TITLE OMITTED]

(Filed March 15, 1972)

JUDGMENT AND COMMITMENT

On this 15th day of May, 1972, at Phoenix, Arizona came the Attorney for the Government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violating Title 18, Sections 922(a)(6), 924(a) and 1202(a)(1), United States Code (Making false statements in connection with the acquisition of a firearm; Possession of firearm by convicted felon), as charged in counts 1 through 12 of the Superseding Indictment.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on each of said counts 1 thru 12, to be served concurrently and consecutively with sentences imposed in cases CR-71-371 Phoenix and CR-71-376 Phoenix.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

W. C. COPPLE

United States District Judge

APPENDIX D

[TITLE OMITTED]

(Filed January 19, 1972)

SUPERSEDING INDICTMENT

VIO: 18 U.S.C. §922(a)(6)
18 U.S.C. §924(a)
18 App.U.S.C. §1202(a)(1)
(Making False Statement in Connection with the Acquisition of a Firearm; Possession of Firearm by Convicted Felon)

THE GRAND JURY CHARGES:

COUNT I

On or about the 18th day of June, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, to-wit: Colt .45 caliber pistol, Serial No. 32580 NM, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Title 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6) and 924(a), Title 18, United States Code.

COUNT II

On or about the 18th day of June, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, to-wit: Colt .45 caliber pistol, Serial No. 27757NM, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Title 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6) and 924(a), Title 18, United States Code.

COUNT III

On or about the 19th day of August, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, towit: Colt .45 caliber pistol, Serial No. CLW007753, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Title 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6) and 924(a), Title 18, United States Code.

COUNT IV

On or about the 19th day of August, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, to-wit: Smith & Wesson .38 caliber revolver, Serial No. 722890, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Title 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6) and 924(a), Title 18, United States Code.

COUNT V

On or about the 26th day of August, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, to-wit: Colt 9mm pistol, Serial No. 59462LW, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter, Title 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6), and 924(a), Title 18, United States Code.

COUNT VI

On or about the 26th day of August, 1970, in the District of Arizona, ROBERT JAMES ANDRINO, in connection with the acquisition of a firearm, to-wit: Colt .45 caliber pistol, Serial No. 33674NM, from a licensed dealer in firearms, knowingly made a false and fictitious statement, likely to deceive such dealer with respect to a material fact as to the lawfulness of the sale of such firearm pursuant to Chapter 44, Tilte 18, United States Code, in that he, knowing that he had been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, stated that he had not been convicted of a crime punishable by imprisonment for a term exceeding one (1) year, in violation of Sections 922(a)(6) and 924(a), Title 18, United States Code.

COUNT VII

On or about the 18th day of June, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, being then a person who had been convicted of a felony by a Nevada State Court, to-wit: swindling, did knowingly receive a firearm, that is, Colt .45 caliber pistol, Serial No. 32580NM, in commerce and affecting commerce in violation of Section 1202(a), Title 18, Appendix, United States Code.

COUNT VIII

On or about the 18th day of June, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, having been convicted of a felony by a Nevada State Court, to-wit: swindling, did knowingly possess a firearm, that is, Colt .45 caliber pistol, Serial No. 27757NM in violation of Section 1202(a), Title 18, Appendix, United States Code.

COUNT IX

On or about the 19th day of August, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, having been convicted of a felony by a Nevada State Court, to-wit: swindling, did knowingly possess a firearm, that is, Colt .45 caliber pistol, Serial No. CLW007753, in violation of Section 1202(a), Title 18, Appendix, United States Code.

COUNT X

On or about the 19th day of August, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, having been convicted of a felony by the Superior Court of California for San Benito County, to-wit: conspiracy, wilfully and knowingly possessed a firearm, that is, Smith & Wesson .38 caliber revolver, Serial No. 722890, in violation of Section 1202(a), Title 18, Appendix, United States Code.

COUNT XI

On or about the 26th day of August, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, having been convicted of a felony by the Superior Court of California for San Benito County, to-wit: conspiracy, wilfully and knowingly possessed a firearm, that is, Colt 9mm pistol, Serial No. 59462LW, in violation of Section 1202(a), Title 18, Appendix, United States Code.

COUNT XII

On or about the 26th day of August, 1971, in the District of Arizona, ROBERT JAMES ANDRINO, having

been convicted of a felony by the Superior Court of California for San Benito County, to-wit: conspiracy, wilfully and knowingly possessed a firearm, that is, Colt .45 caliber pistol, Serial No. 33674NM, in violation of Section 1202(a), Title 18, Appendix, United States Code.

A TRUE BILL

/s/ William (unreadable signature)

Foreman of the Grand Jury

Date: January 19, 1972

RICHARD K. BURKE
United States Attorney
Assistant United States Attorney

/s/ Robert M. Carney

Robert M. Carney
Special Attorney, Department of Justice

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-170.

JAMES ROBERT ANDRINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that because his state felony convictions were expunged under California and Nevada statutes he was no longer a convicted felon barred from acquiring firearms; that the court of appeals was required to address each of his claims of error; and that the government improperly kept his name on an "organized crime watch list," which deprived him of due process and equal protection.

Following a jury-waived trial in the United States District Court for the District of Arizona, petitioner was convicted on each count of a twelve-count indictment (Pet. App. C) charging him with making false statements in connection with the acquisition of a firearm and with receiving and possessing firearms as a convicted felon, in violation of 18 U.S.C. 922(a)(6) and 924(a) and 18 U.S.C. App. 1202(a)(1). He was sentenced to concurrent

terms of two years' imprisonment on each count, to run consecutively to sentences he was then serving for other offenses (Pet. App. B). The court of appeals affirmed (Pet. App. A).

Briefly, the evidence showed that petitioner had previously been convicted of conspiracy to commit acts of prostitution in 1959 in California and of swindling in Nevada in 1963. Both offenses of which he was convicted were felonies, punishable by imprisonment of more than one year. These convictions were subsequently expunged pursuant to the applicable California and Nevada statutes.[1] Following these expungements, petitioner purchased firearms from licensed gun dealers on three occasions in June and August 1970. In each case, petitioner stated on the required federal form for firearm purchases (Form 4473; see 26 C.F.R. 178.124(a)) that he had never been convicted of a felony.

1. The first six counts of the indictment charged petitioner with making false statements to a gun dealer in connection with obtaining firearms. It is undisputed that petitioner had been convicted of felonies in both Nevada and California prior to making these statements. However, petitioner claims that because his convictions were expunged pursuant to the applicable state statutes he was not a convicted felon within the meaning of the statute. This contention is refuted by the California expungement statute. The statute was amended in 1961 to provide that dismissal of an accusation under the expungement statute would not permit an individual to "own, possess or have

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[1]See California Penal Code 1203.4 and Nevada Revised Statutes 176.225 (Pet. 4-6). Both statutes provide for the expungement of criminal convictions in certain instances based on successful completion of probation, economic hardship, etc. Expungement results in a removal of any existing legal disabilities.

in his custody or control any firearm capable of being concealed upon the person or prevent his conviction under Section 12021."[2] California Penal Code 1203.4. Thus, California has by statute rejected the proposition that expungement is a defense to a charge of possession of a firearm by a previously convicted felon.[3] Since expungement is not a defense to a California charge of possession of a firearm by a convicted felon, petitioner cannot properly claim that the expungement eliminated his conviction for purposes of the federal statute.

2. Petitioner contends (Pet. 10-12) that the court of appeals was required to consider his attacks on Counts Seven through Twelve of the indictment despite its affirmance of his conviction on the first six counts. The court of appeals correctly held (Pet. App. A, p. 6):

> Because the defendant was convicted on each of twelve counts, and received the same sentence on each, which were to be served *concurrently*, we need not, for the convenience of the Court decide the validity of the convictions in counts seven to twelve, inclusive. *See United States* v. *Gaines*, 460 F. 2d 176 (2d Cir., 1972).

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[2]Section 12021 prohibits possession or control of a concealable firearm by a convicted felon. The weapons involved in this case are pistols (Pet. App. C).

[3]In support of his argument that the expungement statute relieves him of the responsibility of divulging his past criminal conviction, petitioner relies on *People* v. *Taylor*, 178 Cal. App. 2d 472, 3 Cal. Rptr. 186. However, *Taylor* was decided prior to the 1961 amendment making the expungement statute unavailable as a defense to a charge of possession of a firearm by a convicted felon.

The court of appeals correctly held that analysis of the Nevada statute was unnecessary because petitioner's California felony conviction was sufficient to support his conviction on the first six counts.

See also *Benton* v. *Maryland*, 395 U.S. 784; *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.

3. Finally, petitioner contends (Pet. 13-14) that the government violated due process and equal protection when it maintained his name on a "select list" of known felons. There is certainly no impropriety in law enforcement officers making use of public records of past convictions for law enforcement purposes.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11